

June 9, 2012

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th St., SW
Washington, DC 20554

Re: Continuation of Cable Viewability Requirements for Digital Must-Carry
Television Stations, CS Docket No. 98-120

Dear Ms. Dortch:

On June 8, 2012, Rev. Sheldon Williams, President of the National Black Religious Broadcasters (“NBRB”), John Heffron, Executive Vice President Distribution for Liberman Broadcasting, Inc. (“Liberman”), Randy Nonberg, President and Chief Operating Officer of Una Vez Mas, Ted Bartley, CEO of NRJ TV LLC and NRJ TV II LLC (“NRJ”), and Brandon Burgess, CEO of ION Media Networks, together with Kathleen Kirby of Wiley Rein, John Feore of Dow Lohnes, as well as Israel Klein and Peggy Binzel of the Podesta Group, participated in a telephonic conference call with Dave Grimaldi, Chief of Staff to Commissioner Mignon Clyburn, to discuss the importance of extending the current viewability requirements for must-carry stations. “Millions of subscribers” and “hundreds of broadcast stations”¹ would be harmed by a premature sunset of the rule, particularly minority and low-income subscribers and must-carry stations that offer diverse programming choices to these underserved audiences.

NBRB, Liberman, Una Vez Mas, NRJ, and ION (collectively the “Must-Carry Broadcasters”) expressed their strong support for the Commission’s proposal of a three-year extension of the rule requiring cable operators to make must-carry stations viewable to all cable television subscribers (the “Viewability Rule”) as set forth in the Commission’s February 10, 2012 *Fourth Notice of Proposed Rulemaking and Declaratory Ruling* (“NPRM”) in this docket. The Commission made clear in 2007 that, without the Viewability Rule, “analog cable subscribers and households that rely solely on over-the-air broadcast television may well face ‘a reduction in the number of media voices’ and the loss of the ‘widest possible dissemination of information from diverse and antagonistic sources.’”² The Must-Carry Broadcasters, representing a cross-section of independent broadcasters providing unique and niche services, including foreign language, religious, and entertainment programming targeted to African-American, Hispanic, and Asian audiences, underscored that the Viewability Rule continues to serve an important purpose. Indeed, nothing has changed with respect to the threat to diverse programming obviated by the Viewability Rule since its adoption in 2007. The

¹ *Carriage of Digital Television Broadcast Signals*, Fourth Further Notice of Proposed Rulemaking and Declaratory Order, 27 FCC Rcd 1713, ¶ 10 (2012) (“NPRM”).

² *Carriage of Digital Television Broadcast Signals*, Third Report and Order and Third Further Notice of Proposed Rulemaking, 22 FCC Rcd 21064, ¶ 15 (2007) (“*Viewability Order*”).

Commission recognized that overriding policy objective when it proposed the rule's extension in February of this year.³ Moreover, the Must-Carry Broadcasters emphasized that the proposal for a six-month sunset of the rule followed by equipment options for cable operators will result in significant confusion for consumers, impose substantial practical limitations on viewers' ability to directly access must-carry signals, and disproportionately affect minority and low-income consumers, who over index as analog-only subscribers.

There remain 12.6 million cable households—or about 34 million cable viewers—that rely on analog-only service. If the Viewability Rule is allowed to sunset prematurely—before a significant reduction in the number of remaining analog homes—then for a large number of consumers, including the elderly, those who do not speak English, families that cannot afford set-top boxes for incremental television sets or for whom an equipment solution otherwise presents a significant impediment, the analog tier will include only those “big media” programmers who are able to provide for analog carriage contractually. Many will not understand the need for additional equipment to view only certain of the stations included in their cable subscription, or the incremental cost to properly equip additional outlets may be too much to bear. As a practical matter, these viewers will no longer have access to the diverse, programming choices offered by the Must-Carry Broadcasters and numerous others like them. At the same time, the loss of these viewers may well have an impact on the continued viability of independent programmers and their ability to compete with entrenched video programmers. Either way, it is traditionally underserved audiences that will be harmed.

While cable operators have suggested that removal of the Viewability Rule will free up bandwidth for higher speed broadband, there is no assurance that the bandwidth will not simply be recycled to carry additional programming from large companies in exchange for reduced carriage fees or other payment to cable companies. In any event, Must-Carry Broadcasters posit that the interest in higher speed broadband, which is an amorphous one for the benefit of our country's more affluent citizens, must be carefully weighed against the clear, immediate, and tangible consequences for our poor and underserved. Indeed, if cable operators are truly interested in offering better services for their customers, they would complete their own digital transition, as several have done successfully. That would moot the need for any continued Viewability Rule.

It has become abundantly clear in the few short weeks since Must-Carry Broadcasters learned (from an article in *Communications Daily*, not through any substantive release by the agency itself) that the Commission was considering anything other than the three-year extension proposed in the *NPRM*. The record heretofore in this proceeding was minimal. Given the quantity and quality of information submitted by numerous parties in only the past few days about the actual consequences of premature sunset of the Viewability Rule, it is clear that a rush to eliminate the rule in six months is ill-advised. It is incumbent upon the Commission to extend the Viewability Rule, at least

³ See *NPRM* at ¶7.

for some significant period, so that it can thoughtfully examine and perhaps seek additional information about the effect on subscribers, particularly minority and low-income consumers, as well as the problems inherent in an equipment solution, and the threat to diverse programming. Moreover, consumer outreach by cable companies over a short six-month period will surely prove ineffective, and sufficient time must be afforded to conduct an in-depth educational campaign before the analog signals of must-carry stations disappear from viewers' sets.

Participants on the call each also spoke to the consequences for his constituents/company. NBRB stressed that a six-month sunset of the Viewability Rule would adversely affect minority viewers, especially those who are sick and/or shut-in. The NBRB is concerned that many consumers, including its members' analog-only viewers, will not read and likely will not understand any notice provided in bill stuffers or email notices from cable operators. In addition, Rev. Williams stated that many ministers operating on razor-thin margins would be forced off-the-air without viewership by analog must-carry consumers.

ION, whose viewership is heavily African-American, added that the Viewability Rule constitutes an assault on diversity on two fronts. First, any requirement to install and pay high and prohibitive monthly fees for a set-top box to watch must-carry stations amounts to a "Diversity Tax" on low-income households and minorities. Second, elimination of must-carry stations on the analog tier will reduce the diversity of voices available to 12 million analog households.

Una Vez Mas, which owns the largest group of Azteca America affiliated stations in the U.S., and Liberman, a station owner whose relatively new Estrella TV has grown in three short years to become a competitive Spanish-language alternative, underscored that allowing the Viewability Rule to sunset would place independent broadcasters relying on must-carry at a competitive disadvantage because viewers would still be able to view channels offered by programmers remaining on the analog tier under retransmission consent or other contractual agreements, including Univision and Telemundo. A high percentage of viewership for each of these Spanish-language broadcasters comes from analog-only homes, and each would suffer significant losses if the Viewability Rule is allowed to sunset before the number of existing analog homes is sizably diminished. Moreover, the costs imposed on consumers to lease or buy set-top boxes for incremental analog television sets in their homes would further erode viewership. Cable operators' claims of offering low- or no-cost DTAs do not account for the "additional outlet charge," which could exceed more than \$89 per year per outlet.⁴

NRJ, the proposed assignee of KSCI, Los Angeles' top Asian-language television station, echoed that elimination of the Viewability Rule would significantly and

⁴ See, e.g., Comcast Channel Line-up and Pricing Guide, Summit County Colorado, *available at* <http://www.summitresortgroup.com/hoa/documents/ComcastChannelLineUp.pdf>.

negatively impact the ability of independent stations that are already struggling for survival to serve their local markets.

Were the Commission to do any thoughtful analysis of the digital transport adaptor (“DTA”) equipment solutions advanced by cable operators, it would inevitably determine that they simply are not viable. *Just two days ago*, the Media Bureau granted a waiver in a separate proceeding based on “the lack of DTA boxes available.”⁵ Moreover, one need only look at the thousands of consumer complaints filed in the Commission’s *Basic Service Tier Encryption* rulemaking proceeding to be educated about the inconvenience and impracticality of DTAs.⁶ Indeed, NCTA’s own information on DTAs indicates that DTAs have “[n]o direct output – only “VCR-like” Channel 3 output (bad quality),” and are equipped with “a completely different – and incompatible – remote control.”⁷

The Must-Carry Broadcasters believe that the Commission should adopt the statutorily mandated viewability proposal included in the *NPRM*. At a minimum, the Commission should extend the Viewability Rule for some meaningful period until the number of customers relying on it substantially declines, and until the impact on minority and low income consumers can be appropriately assessed and effectively addressed.

⁵ See *Baja Broadband Operating Company, LLC*, DA No. 12-899, ¶¶ 4-5 (rel. Jun. 7, 2012).

⁶ See Comments of 2,917 Consumers, Docket MB 11-169 (filed Mar. 21, 2012). For instance, Gregory Shinn wrote that “[w]e are a non-profit provider of affordable and supportive housing. We are able to offer basic cable to people on very low fixed incomes in their apartments. If fees for this service increase and each tenant is required to have a converter box and [incur] a monthly fee *then we will no longer be able to offer this service*. All of our tenants will be priced out of the market which amounts to discrimination against people with disabilities on fixed incomes.” *Id.*, at 10 (emphasis added).

⁷ Comments of NCTA at 13, providing a link to http://www.bocscsco.com/comcast_dta.php, Docket 98-120 (filed Mar. 3, 2012).

Ms. Marlene H. Dortch

June 9, 2012

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Very truly yours,

_____/s/
Rev. Sheldon Williams
Vice President
National Black Religious Broadcasters

_____/s/
John Heffron
Vice President
Liberian Broadcasting, Inc.

_____/s/
Ted Bartley
CEO
NRJ TV LLC and NRJ TV II LLC

_____/s/
Randy Nonberg
President and COO
Una Vez Mas

_____/s/
Brandon Burgess
CEO
ION Media Networks

cc: Chairman Genachowski, Commissioners McDowell, Clyburn, Rosenworcel, and Pai;
Susan Aaron, Evan Baranoff, Matthew Berry, Steven Broeckaert, Michelle Carey, Lyle
Elder, Dave Grimaldi, Sean Lev, Erin McGrath, Holly Saurer, Austin Schlick, Sherrese
Smith